No. 16037

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond Builders, Inc., Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

EDGAR C. KELLER,
302 Katz Building,
San Bernardino, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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ARGUMENT.

I.

Historical Background of Stop Notices.

In his "Reply to Point I," respondent makes no reference to the matters set forth by appellant under this point. Rather, he argues a new and totally irrelevant point, namely, that some of the general creditors had furnished labor or materials to the construction and should be entitled to share equally with appellant even though they did not perfect their claims by filing stop notices. Although, in fact, it may be true that some of the general creditors did so furnish materials or labor, it certainly is not true that all did. To give the construction loan funds to the general creditors would be of only incidental benefit to those who furnished labor and materials in the construc-

tion, while giving the general creditors as a whole a windfall. In any event, the factual statements made by respondent are outside the record and totally irrelevant to the present determination.

Moreover, there is no reason why those who have not seen fit to expend the time and money for attorney fees and bond premiums necessary to perfect a stop notice right should share in the funds secured by the stop notice. Indeed, Code of Civil Procedure Section 1190.1(h) requires the lending institution to withhold only enough money to satisfy the stop notices filed; if that amount had then to be split among all creditors who furnished materials or labor, there would be little purpose for any one individual to file a stop notice.

II.

The Legislative Intent of Section 1190.1 Requires Sustaining Appellant's Stop Notice Right.

Again respondent goes outside the record in his reply to this point, asserting that appellant's argument is now different from that before the District Court. Such assertion is not only outside the record and immaterial, but also substantially in error. In the opening brief of appellant in the District Court, two questions were considered: whether a subcontractor was entitled to the stop notice remedy, and whether appellant was a contractor within the meaning of Section 1190.1(h) by reason of his having dealt directly with the owner. Respondent impliedly conceded the first point and thereafter the appellant's final brief and the oral argument centered about the second point.

Appellant's Point II was devoted to a consideration of the purpose of the Legislature in enacting Code of Civil

Procedure Section 1190.1(h). Appellant's Point III pointed out that the phraseology of Code of Civil Procedure, Section 1190.1(h) provides further indication of the purpose of the Legislature. In his reply to these points respondent ignores the history and logic of appellant's argument. Rather, respondent replies, not directly but obliquely, grounding his argument on the semantic quibble that since appellant was not a subcontractor (under terminology developed in an entirely different context) he was a contractor and, therefore, excluded from the benefits of Code of Civil Procedure, Section 1190.1-(h). He advances no reason why the Legislature should have so intended; he ignores the purpose of the law.

Appellant submits that laws have a purpose and that where a word such as "contractor" is so used as to create an ambiguity, the courts should adopt the interpretation that will promote the purpose of the law, not the interpretation which will defeat it.

It is well recognized that mechanics' lien statutes are remedial and to be broadly construed. Pursuant to this philosophy, the California Courts have held that a statute giving municipal courts jurisdiction in actions to foreclose liens of "mechanics, materialmen, artisans, and laborers" also gives jurisdiction to foreclose liens of contractors and subcontractors.

> *Gallagher v. Campodonico* (1931), 121 Cal. App. (Supp.) 765.

Certainly, where there is an ambiguity as to who is to be embraced in the phrase, "the contractor," in a phrase excluding some individuals from the use of a remedy, the courts should resolve such ambiguity by adopting an interpretation limiting the exception rather than expanding it.

The purpose of the stop notice law is to permit one who has contributed to the construction of a building but is not in privity with the holder of the funds to intercept such funds before they are paid to one in privity with the holder. Code of Civil Procedure Section 1190.1(h) was written to exclude "the contractor," on the obvious assumption that there was only one contractor on each job—the person to whom progress payments are normally paid from construction loan funds. The distinction between an original contractor and a subcontractor, which respondent belabors for the bulk of his brief, is not pertinent to this case. As evidence of this, let us examine the cases he cites.

Respondent quotes a sentence from *Hihn-Hammond Lumber Company v. Elson* (1915), 171 Cal. 570, 154 Pac. 12. Appellant here wishes to quote not only that sentence, but also some of the sentences preceding it in order that the full context may be understood:

> "Section 1194 divides the liens which can be asserted against property under the Mechanic's Lien Law into four classes, to wit, laborers, materialmen, subcontractors, and original contractors. The meaning of the term 'subcontractors,' as there used, must be determined by reference to this classification and to the subject to which it relates. *The original contractor is the person who agrees with the owner to construct a building on his property.* . . . The term 'subcontractor' embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner." (Emphasis added.)

It is apparent that appellant is not an "original contractor" under this definition any more than he is a sub-

contractor, as he did not agree to construct a building. Respondent's quotation from 31 *Cal. Jur.* 2d 614, of course, is based on this case. This illustrates the fallacy of attempting to apply definitions developed in one context to an entirely different factual and legal situation.

Similarly, respondent has no quarrel with the cases of *Pugh v. Moxley* (1912), 164 Cal. 374, 128 Pac. 1037, and *LaGrill v. Mallard* (1891), 90 Cal. 373, 27 Pac. 294, cited by respondent for the proposition that one may be an original contractor although he has agreed to do only a part of the construction of a building. These cases involved interpretations of code sections which used the specific phrase, "original contractor." Their only real relevance is to point out the fact that when the Legislature has sought to distinguish, "original contractors" from others, it has specifically used the phrase "original contractor." This was not done in Code of Civil Procedure Section 1190.1(h).

Respondent concludes his reply to Point II (Resp. Br. p. 10) by condemning appellant's attempt to read the word "general" into Code of Civil Procedure Section 1190.1(h), so as to make it read "any of the persons mentioned in sections 1181 and 1184.1, except the *general* contractor . . . (may file a stop notice)." Appellant must plead guilty. But what respondent seeks to do is to change the wording to read "Any of the persons . . . except *any original* contractor. . . ." Appellant submits that respondent's interpretation plays much faster and more loosely with the phraseology of the Legislature than does appellant's.

Of course, there is no authority in decided appellate cases for appellant's interpretation; nor is there any for respondent's. This question is one of first impression.

There was no reason for it to arise until the enactment of Code of Civil Procedure Section 1190.1(h) in 1951, because the earlier stop notice laws permitted filing stop notices only against owners—not against lending agencies. Any original contractor was in privity with the owner, could sue directly, and had no need or use for the remedy of "equitable garnishment" afforded by the stop notice procedure.

It is true, as respondent asserts, that the word "general" is not present as explicitly modifying "contractors" in Section 1181. Neither, however, is the word "original" present. An examination of the Code will reveal that when the Legislature wished to indicate "original contractor" they used that phrase. (Code Civ. Proc., Sec. 1193.1.) No indication is found of the use of the word "general" before contractor in any other code section pertaining to liens, and respondent submits that this is probably true because the Legislature considers the word "contractor" enough to import "general contractor," at least where it is preceded by the article, "the".

III.

The Phraseology of Code of Civil Procedure, Section 1190.1(h), Requires Sustaining Appellant's Stop Notice Right.

In his Opening Brief, appellant pointed out that (1) the use of the word "the" before "contractor" indicated an intention to exclude only one contractor on a job, and (2) throughout Code of Civil Procedure Section 1190.1(h) the "contractor" was referred to in the singular and bracketed with the "owner" as to his rights and limitations. This is because "the contractor" and the "owner" are the persons normally entitled to receipt of the construction loan funds in the absence of a stop notice, and

is further indicative that when the Legislature used the words, "the contractor," it was talking about the general contractor.

In reply, respondent states that Code of Civil Procedure Section 1190.1 was derived from the old Sections 1183 and 1184. In *Pugh v. Moxley, supra,* the court indicated that the word contractor included an original contractor who did only a portion of the total work. As a matter of fact, the old Sections 1183 and 1184 were very comprehensive and contained much more of the mechanic's lien law than merely the stop notice provisions. *Pugh v. Moxley* had nothing to do with stop notices, but rather concerned distinguishing between original contractors and materialmen within the meaning of the provision, since repealed, requiring original contracts in an amount of $1,000.00 or more to be written and recorded.

Inasmuch as respondent has quoted from the old stop notice provision of the Code as set forth in *Russ Lumber & Mill Company v. Garrettson* (1891), 87 Cal. 589, 25 Pac. 747, appellant urges the court to read that code section, or the portion set forth in the *Russ* case at page 593, which reads as follows:

> "Any of the persons mentioned in Section 1183, except the contractor, may, at any time, give to the reputed owner a written notice that they have performed labor or furnished materials, or both, *to the contractor, or other person acting by authority of the reputed owner,* or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. . . . Upon such notice being given, it shall be the *duty of the person*

> *who contracted with the contractor to, and he shall, withhold from his contractor,* or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may became due, to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter . . ." (Emphasis added.)

Perhaps this old phraseology more clearly sets forth the obvious intent of the stop notice section to effect an equitable garnishment or interception of funds due from the holder to the person in privity with the holder.

IV.

If There Be Ambiguity in the Phraseology of Code of Civil Procedure Section 1190.1(h), the Construction Loan Agreements Resolve Same.

Respondent states that any third party beneficiary rights which appellant may have would also be available to the others who contributed to the construction. This would be true, of course, if the others had pursued their rights; the fact that they did not cannot defeat appellant's right. See *Smith v. Anglo-California Trust Company* (1928), 205 Cal. 496, 505, 271 Pac. 898.

Again, respondent urges the rights of all general creditors on the basis of what some general creditors contributed to the construction. Again, such an argument is irrelevant and without merit.

Finally, respondent asserts that to give appellant any rights as a third party beneficiary would defeat the intent of the Legislature. There is certainly nothing in the Statute which warrants the conclusion that third party beneficiary contracts are not to be given effect.

V.

The Fact That "Original Contractors" Are Given More Time to File Liens Than Subcontractors and Materialmen Under Code of Civil Procedure Section 1190.1 Is Irrelevant to an Interpretation of the Word "Contractor" in Code of Civil Procedure Section 1191.1(h).

The logic of Respondent's Point VI has a Louis Carroll-like quality; it is difficult to grasp or analyze. In essence, respondent seems to state that (1) Code of Civil Procedure Section 1193.1 gives original contractors more time than subcontractors and materialmen within which to file liens; (2) this indicates an intent to include all original contractors within the terminology, "contractor"; and (3) that having had this preferred treatment, along with general creditors, all original contractors should be embraced within the words "the contractor," and excluded from the stop notice remedy of Code of Civil Procedure Section 1190.1(h).

(1) The above is not exactly true. Section 1193.1 permits subcontractors and materialmen to file *any time* after completing the performance *or* within 30 days after filing the notice of completion. Most of them complete performance well before the entire construction is completed so they will generally have more than 60 days, let alone more than 30 days, after they complete performance within which to file a lien. As soon as an original contractor has completed his performance, however, a notice of completion may be filed under Code of Civil Procedure Section 1193.1, so he will nearly always be limited to the 60-day period. The reason for the distinction in filing times is obvious, and has nothing to do with Section 1190.1(h).

A logical analysis of (2) above will show that the contrary contention is true. The Legislature did not refer to "the contractor" in Section 1193.1, but to "every original contractor." Rather than indicate that all original contractors are included in the term, "contractor" as respondent states, this indicates that if the Legislature meant "all original contractors" in Section 1190.1(h), it would have said so just as it did in Section 1193.1.

(3) above as the conclusion based on (1) and (2), must fall.

Conclusion.

The stop notice law, as a concommitant of the mechanic lein law, is to be construed liberally to effect its salutory purpose and not in conformity with groundless semantic quibbles. Therefore, the order and judgment appealed from should be reversed.

Respectfully submitted,

EDGAR C. KELLER,

Attorney for Appellant.